

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JONATHAN P. COLE,

Plaintiff,

v.

JON E. LITSCHER;
MICHAEL CATALANO;
PRISON HEALTH SERVICES, INC.;
PAM BARTELS;
JOHN W. KUSSMAUL; D. ESSER;
FUERSTENBURG; JANTZEN;
TIM F. HAINES; SHIRLEY OLSON;
KERRY MELBY; BECKY MANNING;
and GERALD A. BERGE,

Defendants.

ORDER

04-C-116-C

Plaintiff has filed two motions. The first is titled a motion to “reinstate claims of denial of access to telephone and denial of the ability to order the local newspaper,” and the second is titled a motion to “amend[] and correct[] names of defendants of Prison Health Service, Inc.” I construe plaintiff’s motion to reinstate his claims of denial of the ability to order the local newspaper and denial of access to the telephone as a motion to reconsider the dismissal of these claims in this court’s orders of March 15, 2004 and October 25, 2004,

respectively. Further, I construe plaintiff's motion to amend and correct the names of certain defendants working for Prison Health Services, Inc. as a second motion for reconsideration of an order entered by District Judge Lynn Adelman of the District Court for the Eastern District of Wisconsin on February 27, 2004, in which Judge Adelman dismissed Doe defendants 2-33, 38, 40-81, 83, 85-94, B-C and F-P. Both of plaintiff's motions will be denied as untimely.

A glimpse at the history of this case may be helpful to understand why it is too late for plaintiff to seek at this time to serve new defendants or revive claims that have been considered and dismissed. Plaintiff Jonathan Cole and a co-plaintiff, Edward Youngblood, filed this action in July 2002 in the United States District Court for the Eastern District of Wisconsin against 25 defendants, 24 of which were John and Jane Does. Before the court could decide whether Cole and Youngblood would be allowed to proceed in forma pauperis with their claims, plaintiffs filed an amended complaint on September 10, 2002 and paid the \$150 filing fee. The proposed amended complaint listed thirteen additional plaintiffs and 90 additional defendants, 86 of whom were Doe defendants.

On March 7, 2003, Judge Adelman screened the voluminous first amended complaint pursuant to 28 U.S.C. § 1915A, and allowed plaintiffs to proceed on a host of claims meticulously identified in the order. Subsequently, on February 26, 2004, Judge Adelman dismissed Doe defendants 2-33, 38, 40-81, 83, 85-94, B-C and F-P, and gave plaintiffs until

March 26, 2004, in which to name Doe defendants 1, 34-37, 39, 82, 84, A, D and E. In the same order, he transferred the case to this district.

On March 11, 2004, plaintiff filed a letter naming Doe defendants 1, 34, 35, 37, 82, 84, A, D and E. In addition, he moved for reconsideration of that part of Judge Adelman's February 26 order that dismissed defendants Doe 2-33, 38, 40-81, 83, 85-94, B-C and F-P. I denied plaintiff's motion for reconsideration in an order dated April 21, 2004, after concluding that plaintiff remained unable to identify these defendants nearly two years after filing his complaint, and that further delay in the progress of the case to allow him to learn their names was not justified.

In the meantime, on March 18, 2004, I dismissed several of plaintiff's co-plaintiffs from the suit and severed the claims of the remaining plaintiffs. In addition, I dismissed on this court's own motion plaintiffs' claim that the Wisconsin Secure Program Facility's level system restrictions on reading materials, including the local newspaper, deprived them of their First Amendment rights.

On May 5, 2004, plaintiff Cole moved a second time for reconsideration of the Judge Adelman's dismissal of Doe defendants 2-33, 38, 40-81, 83, 85-94, B-C and F-P. In addition, plaintiff argued that Judge Adelman erred in the February 26 order in dismissing certain of his Doe defendants for failure to state a claim against them. In denying this second motion for reconsideration, I noted in an order dated May 18, 2004,

Given the fact that plaintiff undertook in his complaint to assert the claims of 14 plaintiffs as well as himself against dozens of Doe defendants, it is quite possible that Judge Adelman may have overlooked a potential defendant against whom plaintiff seeks to recover damages. However, Judge Adelman screened plaintiff's complaint more than a year ago. Although he did not expressly dismiss Doe defendants 2-33, 38, 40-81, 83, 85-94, B-C and F-P until February 26, 2004, plaintiff was put on clear notice of the claims on which he was being allowed to proceed and the claims that were being dismissed on March 7, 2003. If he believed that Judge Adelman had overlooked a claim or a potential defendant, he should have raised the issue then.

I remain convinced that plaintiff could have proceeded more promptly to discover who the Doe defendants were so that he could amend his complaint to name them and serve them with the complaint. Even now, plaintiff does not appear to know who the cast of characters are that he wishes added to his lawsuit, and I am not willing to delay the proceedings even longer while he figures it out. It is time to move on.

In August 2004, defendants Litscher, Kussmaul, Esser, Jantzen, Fuerstenberg, Berge and Haines moved for dismissal of several of plaintiff's claims. In their motion, defendants undertook to identify which of the claims in the group complaint pertained to plaintiff Cole. Among the claims defendants listed as potentially still viable was a claim that defendant Berge violated plaintiff's First Amendment rights by denying him access to a telephone for lengthy periods. I ruled on the motion to dismiss on October 25, 2004. In that order, I addressed defendants' stated understanding of plaintiff's remaining claims. In particular, I made it clear that I had dismissed plaintiff's First Amendment claim of denial of access to a telephone on March 15, 2004, because I considered the claim to be a sub-part of plaintiff's

challenge to the five-tiered incentive program at the Wisconsin Secure Program Facility.

On January 31, 2005, the parties completed briefing the motion for summary judgment of defendants Litscher, Kussmaul, Esser, Jantzen, Fuerstenberg, Berge and Haines. That same day, the Prison Health Services defendants filed a motion for summary judgment. According to the schedule established for briefing that motion, plaintiff Cole has until March 4, 2005, in which to oppose the motion. If the case survives defendants' motions for summary judgment, the case will go to trial on June 20, 2005.

It is perplexing why plaintiff is concentrating his efforts at this late date to reargue matters that Judge Adelman and I decided long ago. I have addressed plaintiff's argument that Judge Adelman overlooked two Doe defendants against whom he believes he should have been allowed to proceed. I have explained to plaintiff that if he thought Judge Adelman had made a mistake in his February 2004 order, he should have pointed out the errors promptly after the order was entered. His failure to even notice the errors within a reasonable time to move to correct them is just one of the many perils he might have expected to face when he decided to package in one lawsuit dozens of claims against dozens of persons whose identities he had not taken the time to learn.

Likewise, plaintiff has waited too long to file a motion to reinstate his claims of denial of access to a telephone and local newspapers. The defendant corrections officials responsible for the telephone and newspaper policies have already moved for summary

judgment on the claims remaining against them. That motion is presently under advisement. In any event, plaintiff makes no argument in his motion to reinstate that convinces me that I erred in determining that these claims are a sub-part of plaintiff's challenge to the constitutionality of the various incentives defendants offer prisoners in relation to their status in the prison's level system, a challenge I have found to lack legal merit.

ORDER

IT IS ORDERED that

1. Plaintiff's motion to reconsider the dismissal of his claims that his constitutional rights are being violated by defendants' refusal to allow him access to the local newspaper and a telephone is DENIED.

2. Plaintiff's second motion for reconsideration of Judge Adelman's dismissal of Doe defendants 2-33, 38, 40-81, 83, 85-94, B-C and F-P is DENIED.

Entered this 1st day of February, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge